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## AirAsia Bhd v Rafizah Shima bt Mohamed Aris

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–2751–11 OF 2012
ZAHARAH IBRAHIM, ZAWAWI SALLEH AND UMI KALTHUM JJCA
3 JULY 2014

C

*International Law — Conventions — Binding effect within Malaysia — Whether Parliament must legislate to make convention/treaty operable and enforceable within Malaysia — Whether mere ratification by Malaysia of conventions/treaties insufficient to make them domestically enforceable — Whether Convention on Elimination of All Forms of Discrimination against Women had no force of law in Malaysia as same was not enacted into local legislation — Whether statute would prevail if local law conflicted with international law which had yet to be 'domesticated' — Whether constitutional law, as branch of public law, applied only when individual's rights were violated by public authority and not in disputes between private parties*

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The respondent had signed an agreement with the appellant which contained a clause ('cl 5.1 (4)') forbidding her from getting pregnant during the duration of a four year aircraft maintenance engineering training programme she was chosen to undergo. The clause provided that if she did get pregnant it would be a repudiation of the agreement. The appellant terminated both the agreement and her employment when it found the respondent became pregnant during the final year of the course. The appellant obtained judgment for agreed liquidated damages of RM92,000 against the respondent in the sessions court but the same was set aside on appeal. The respondent applied to the High Court to declare void cl 5.1(4) for being, inter alia, in breach of arts 8 and 11 of the Federal Constitution, the United Nations Universal Declaration of Human Rights and the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'). She also sought an order that she was not liable to the appellant for damages and that it was the appellant, instead, which was liable to pay her damages for wrongfully terminating her employment. The High Court allowed the respondent's application. In the instant appeal against that decision, the appellant contended that since the dispute was between private parties and not a breach of an individual's rights by a public authority, the provisions of the Federal Constitution had no application and that that principle was upheld by the Federal Court in the case of *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Anor* [2004] 4 MLJ 466 ('*Beatrice*'s case'). It was also contended that the courts did not have to take into account the provisions of CEDAW when defining or determining

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gender discrimination just because Malaysia had signed and ratified that Convention.

**Held,** allowing the appeal and setting aside the decision of the High Court:

(1) Clause 5.1(4) of the agreement did not discriminate against the rights of women. All clauses in the agreement, especially cl 5.1(4), did not restrain marriage and/or prohibit pregnancy if the respondent had completed the training programme in the manner stipulated in the agreement (see para 55).

(2) CEDAW did not have the force of law in Malaysia because the same was not enacted into any local legislation. For a treaty to be operative and enforceable in Malaysia, it required legislation by Parliament. Without express incorporation into domestic law by an act of Parliament following ratification of CEDAW, the provisions of the international obligations in CEDAW did not have any binding effect. Ratification alone did not make the provisions of treaties applicable for municipal law. Also, in Malaysia, the Federal Constitution was silent as to the primacy of international law or municipal law or vice versa. If there was a conflict, the general rule was that the statute would prevail (see paras 37, 41, 44, 49, 50 & 53).

(3) The High Court erred in law and facts in not following the Federal Court's decision in *Beatrice*'s case. It was clear the agreement between the appellant and the respondent was a lawful contract between private parties. *Beatrice*'s case essentially stipulated that constitutional law, as a branch of public law, only addressed the contravention of an individual's rights by a public authority. High Court judges must observe judicial precedents in the interest of finality and certainty in the law and for orderly development of legal rules (see paras 25–26).

**[Bahasa Malaysia summary**

Responden telah menandatangani perjanjian dengan perayu yang mengandungi klausa ('klausa 5.1 (4)') melarangnya daripada hamil sepanjang tempoh empat tahun program latihan kejuruteraan penyelenggaraan pesawat yang memilihnya untuk mengikuti program tersebut. Klausa memperuntukkan jika dia hamil perjanjian tersebut terbatal dengan serdirinya. Perayu menamatkan kedua-dua perjanjian dan pekerjaan apabila mendapati responden mengandung semasa tahun akhir kursus. Perayu memperoleh penghakiman bagi ganti rugi jumlah tertentu yang dipersetujui sebanyak RM92,000 terhadap responden di mahkamah sesyen yang sama tetapi telah diketepikan atas rayuan. Responden memohon kepada Mahkamah Tinggi untuk mengisytiharkan klausa 5.1(4) adalah tidak sah kerana, antara lain, melanggar perkara 8 dan 11 Perlembagaan Persekutuan, Deklarasi Bangsa-Bangsa Bersatu Hak Asasi Manusia dan *Convention on the Elimination*

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*of All Forms of Discrimination against Women* ('CEDAW'). Dia juga meminta satu perintah bahawa dia tidak bertanggungjawab kepada perayu untuk ganti rugi dan bahawa ia adalah perayu, sebaliknya, yang bertanggungjawab untuk membayar ganti rugi kepadanya kerana secara salah menamatkan penggajiannya. Mahkamah Tinggi membenarkan permohonan responden. Dalam rayuan ini terhadap keputusan itu, perayu berhujah bahawa memandangkan pertikaian itu adalah antara pihak-pihak swasta dan bukan pelanggaran hak seseorang individu oleh pihak berkuasa awam, peruntukan-peruntukan Perlembagaan Persekutuan tidak terpakai dan bahawa prinsip tersebut telah dipertahankan oleh Mahkamah Persekutuan dalam kes *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Anor* [2004] 4 MLJ 466 ('kes *Beatrice*'). Ia juga berhujah bahawa mahkamah tidak perlu mengambil kira peruntukan CEDAW apabila mentakrifkan atau menentukan diskriminasi jantina hanya kerana Malaysia telah menandatangani dan mengesahkan Konvensyen itu.

**Diputuskan**, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Klausa 5.1(4) perjanjian itu tidak mendiskriminasi hak-hak wanita. Semua klausa di dalam perjanjian itu, terutama klausa 5.1 (4), tidak melarang perkahwinan dan/atau melarang kehamilan jika responden telah mengikuti program latihan itu mengikut cara yang ditetapkan dalam perjanjian (lihat perenggan 55).

(2) CEDAW tidak mempunyai bidang kuasa undang-undang di Malaysia kerana yang sama tidak digubal di dalam apa-apa undang-undang tempatan. Untuk perjanjian berkuat kuasa dan boleh dikuat kuasakan di Malaysia, ia memerlukan undang-undang yang digubal oleh Parlimen. Tanpa diperbadankan dengan jelas ke dalam undang-undang domestik dengan satu Akta Parlimen berikut pengesahan CEDAW, peruntukan tanggungan antarabangsa CEDAW tidak mempunyai kesan mengikat. Pengesahan sahaja tidak membuat peruntukan-peruntukan perjanjian yang diguna pakai untuk undang-undang munisipal. Juga, di Malaysia, Perlembagaan Persekutuan tidak menyebut tentang kedaulatan undang-undang antarabangsa atau undang-undang munisipal atau sebaliknya. Jika terdapat percanggahan, kaedah umum adalah bahawa statut akan diguna pakai (lihat perenggan 37, 41, 44, 49, 50 & 53).

(3) Mahkamah Tinggi terkhilaf dalam undang-undang dan fakta kerana tidak mengikut keputusan Mahkamah Persekutuan dalam kes *Beatrice*. Ia adalah jelas perjanjian antara perayu dan responden adalah kontrak yang sah antara pihak-pihak swasta. Kes *Beatrice* itu pada dasarnya menyatakan bahawa undang-undang perlembagaan, sebagai satu cabang undang-undang awam, hanya menangani pelanggaran hak seseorang individu oleh pihak berkuasa awam. Hakim-hakim Mahkamah Tinggi

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mestilah mematuhi duluan kehakiman demi kepentingan muktamad dan keyakinan dalam undang-undang serta untuk pembangunan yang teratur bagi peraturan-peraturan undang-undang (lihat perenggan 25–26). ]

**Notes**

For a case on conventions, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 468.

**Cases referred to**

*Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Anor* [2004] 4 MLJ 466; [2005] 2 CLJ 713, CA (refd)
*Malone v Metropolitan Police Commissioner* [1979] 1 All ER 256, CA (refd)
*Mortensen v Peters* (1906) 5 Adam 12 8 F 93, HC (refd)
*Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832; [2012] 1 CLJ 769, HC (refd)
*Periasamy s/o Sinnapan & Anor v PP* [1996] 2 MLJ 557; [1996] 3 CLJ 187, CA (refd)
*PP v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276, FC (refd)
*PP v Narogne Sookpavit & Ors* [1987] 2 MLJ 100 (refd)
*PP v Orhan Olmez* [1988] 1 MLJ 13, SC (refd)
*PP v Wah Ah Jee* [1919] 2 FMSLR 193, SC (refd)
*Regional Centre for Arbitration v Ooi Beng Chooi Anor (No 2)* [1998] 7 MLJ 193, HC (refd)

**Legislation referred to**

Arbitration (Privileges and Immunities) Regulations 1996
Federal Constitution arts 8, 8(1), (2), 11, 39, 74(1), 80, Ninth Schedule
Indian Constitution [IND]
Specific Relief Act 1950
Malaysian Fisheries Act 1963

**Appeal from:** Originating Summons No 24–416–04 of 2012 (High Court, Shah Alam)

*Muhammad Adam Abdullah (Lam Mei Kuan (Wendy) and Wong Jia Ee with him) (V Chong W Lam) for the appellant.*
*Harjinder Singh a/l Kuldip Singh (Jayaganes a/l Rajanderan with him) (Sabarudin Othman & Ho) for the respondent.*

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**Zawawi Salleh JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** Before us there are two related appeals, namely:

(a) Civil Appeal No B-02–2584–10 of 2012 ('first appeal'); and

(b) Civil Appeal No B-02–2751–11 of 2012 ('second appeal'),

which have been consolidated by an order of this court dated 15 February 2013.

**[2]** Since both appeals involve the same parties and concern common questions of fact and law, we heard them together.

**[3]** Both appeals emanate from the decisions of the High Court at Shah Alam, Hadhariah binti Syed Ismail J presiding, in which Her Ladyship had, in the first appeal, allowed the respondent's originating summons ('OS'), seeking for declarations, inter alia,that cl 5.1 (4) of the training agreement and bond entered between the appellant and the respondent is illegal, null and void as the said clause has the effect of discriminating against the respondent's rights as a married woman and in turn it contravenes art 8 of the Federal Constitution of Malaysia and the Convention to Eliminate All Forms of Discrimination Against Women ('CEDAW'). In the second appeal, Her Ladyship had dismissed the appellant's application to strike out the respondent's OS.

**[4]** At the beginning of the hearing of these appeals, learned counsel for the appellant informed us that the appellant wished to withdraw the second appeal. Accordingly, we struck out the same with no order as to costs and deposit to be refunded.

SALIENT FACTS

**[5]** In order to appreciate the issues raised in the first appeal, the following salient facts of the case must be noted.

**[6]** The appellant, AirAsia Bhd, is a company that runs a low cost carrier. The respondent was an employee of the appellant. On 19 October 2006, the respondent was chosen to undergo an Engineering Training Program.

**[7]** The respondent executed an agreement known as 'training agreement and bond' ('agreement'). A material term in the agreement was that the respondent must not get pregnant during the duration of the training period. The training period was approximately four years from the effective date. Effective date was when the respondent first attended the training course.

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**[8]** The relevant clause reads as follows:

> Clause 5.1
>
> It is a fundamental term and condition of the agreement that none of the following events or circumstances shall occur after execution of this agreement. The occurrence of any of the following events and circumstances shall constitute a repudiatory of the agreement:
>
> ...
>
> (4) (This clause is only applicable to female Engineering Trainee) when Engineering Trainee gets pregnant during the Course.

**[9]** In the month of June 2010, the respondent met with the appellant's employee by the name of Kim Chua from the People's Department of the appellant and informed the said Kim Chua that she was pregnant and would only deliver her first child at end of 2010. As such, she would want to continue with her training. Kim Chua consequently instructed the respondent to obtain a doctor's letter confirming the pregnancy. The respondent then furnished the doctor's letter/medical report to Kim Chua confirming her pregnancy.

**[10]** By a letter dated 1 July 2010, the agreement and the employment of the respondent were terminated.

**[11]** The appellant then filed a civil suit at the sessions court for breach of the agreement. The appellant claimed the sum of RM92,000, being the agreed liquidated damages from the respondent.

**[12]** On 18 April 2012, summary judgment was entered against the respondent in the sessions court for the sum of RM92,000. Dissatisfied, the respondent appealed against the decision. Her appeal was allowed by the High Court.

**[13]** In the meanwhile, the respondent filed an OS in the High Court at Shah Alam on 17 April 2012, seeking for:

(a) *satu perintah deklarasi bahawa klausa 5.1 (4) Perjanjian Program Latihan Kejuruteraan bertarikh 5 Disember 2006 adalah terbatal, tidak sah dan tidak terpakai*;

(b) *satu perintah deklarasi bahawa klausa 5.1(4) Perjanjian tersebut adalah bertentangan dengan prinsip kepentingan awam dan/atau* seksyen 24(e) Akta Kontrak 1950 *dan seksyen 43 Akta Pekerja 1950; dan/atau Artikel 3, 5, 8 dan 11 Perlembagaan Persekutuan Malaysia dan/atau mendiskriminasi hak plaintif sebagai seorang wanita dan isteri yang berumahtangga dan Deklarasi Hak Asasi Pertubuhan Bangsa-Bangsa Bersatu ('United Nations Universal Declaration of Human Rights') dan ('Convention on the Elimination of All Forms of Discrimination against Women' (CEDAW)*;

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(c) *satu perintah bahawa plaintif tidak bertanggungan dan tidak berhutang dengan defendan akibat tindakan defendan secara salah dan tidak sah menamatkan perkhidmatan plaintif berdasarkan peruntukan klausa 5.1 (4) perjanjian tersebut*;

(d) *satu perintah deklarasi bahawa tindakan defendan menamatkan perkhidmatan plaintif berdasarkan peruntukan klausa 5.1(4) Perjanjian Program Latihan Kejuruteraan bertarikh 5 Disember 2006 tersebut adalah tidak sah dan salah ('illegal') berdasar peruntukan prinsip kepentingan awam dan/atau s 24(e) Akta Kontrak 1950; dan s 43 Akta Pekerja 1950; dan/atau Artikel 3, 5, 8 dan 11 Perlembagaan Persekutuan Malaysia dan/atau mendiskriminasi hak plaintif sebagai seorang wanita dan isteri yang berumah tangga dan Deklarasi Hak Asasi Pertubuhan Bangsa-Bangsa Bersatu ('United Nations Universal Declaration of Human Rights') dan ('Convention on the Elimination of All Forms of Discrimination against Women' (CEDAW)*;

(e) *satu perintah penggantungan kesemua prosiding lain yang berkaitan dengan tuntutan ini sehingga pelupusan tindakan ini*;

(f) *ganti rugi punitif, teladan dan ganti rugi keterlaluan untuk ditaksirkan*;

(g) *kos*;

(h) *faedah*.

**[14]** At the hearing of the OS in the High Court, the respondent had elected to rely on arts 8 and 11 of the Federal Constitution and CEDAW.

**[15]** The appellant had, on 30 April 2012, filed a summons in chambers to strike out the respondent's OS.

**[16]** On 12 October 2012, the High Court granted the respondent's OS and dismissed the appellant's application to strike out the OS. Hence, these appeals.

THE PARTIES' RESPECTIVE SUBMISSIONS

**[17]** Learned counsel for appellant submitted that the learned judge fell into serious error when she failed to apply the principle decided in the *Beatrice AT Fernandez v Sistem Penerbangan Malaysia & Anor* [2004] 4 MLJ 466; [2005] 2 CLJ 713 ('*Beatrice* Case') to the respondent's OS. It was the contention of the learned counsel that the parties in the respondent's OS are private parties and as such, the provisions of the Federal Constitution had no application. According to learned counsel, constitutional law as a branch of public law only addresses the contravention of an individual's rights by a public authority. However, when the rights of a private individual are infringed by another private individual, constitutional law will take no recognisance of it. It is not in dispute that AirAsia Bhd, is a private limited liability company.

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**[18]** Learned counsel for the appellant further submitted that the learned judge erred in relying on the decision of the High Court in *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832; [2012] 1 CLJ 769 (*Noorfadilla*'s case) which held that the provisions of CEDAW are binding on Malaysia and the same procured the amendment to the Federal Constitution with the introduction of the word 'gender' in art 8(2) of the Federal Constitution. Therefore, the courts have to take into account the provisions of CEDAW when defining or determining gender discrimination.

**[19]** In reply, learned counsel for the respondent submitted that the respondent was seeking a declaratory relief under the Specific Relief Act 1950 (Act 137), inter alia, to declare that cl 5.1(4) of the agreement was void/illegal because it contravened arts 8 and 11 of the Federal Constitution and CEDAW. It was the contention of learned counsel for the respondent that what the respondent was seeking was an individual remedy and not constitutional remedy.

**[20]** Learned counsel for the respondent further submitted that the decision in *Beatrice*'s case could be distinguished on the following grounds:

(a) *Beatrice*'s case placed reliance on a view expressed by Dr Durga Das Basu in his book, 'Comparative Constitutional Law'. The court must be guarded against simply applying part of decisions from courts of other jurisdictions and adopting the same as part of our written law. It is clearly evident that arts 8(1) or (2) of the Federal Constitution does not make any reference to 'State', unlike the Indian Constitution;

(b) *Beatrice*'s case was decided without taking into account the amendment to the Federal Constitution wherein the word 'gender' was added to art 8(2) by the Federal Constitution (Amendment) (No 2) Act 2001 (Act A 1130) which came into force on the 28 September 2001; and

(c) *Beatrice*'s case was different from the present case in that as an engineering trainee, the respondent is not required to work long hours (depending on the flight schedules) and she was not required to fly in different time zones and required much walking in a tight narrow alley in the flight as she was a ground crew and more importantly, as an engineering trainee, she could work until delivery, unlike a flight stewardess.

OUR FINDINGS

**[21]** At the outset, it would be appropriate for us to consider the decision of *Beatrice*'s case. The brief facts of the *Beatrice*'s case was that the applicant, a flight stewardess, had 11 years of service with MAS. The terms and conditions of service of the applicant were governed by a collective agreement between

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MAS Employees Union and MAS. Clause 2 of the collective agreement, para 3 in particular, required an air stewardess to resign if she became pregnant or face termination if she became pregnant. When she became pregnant, she refused to resign and her services were thereby terminated accordingly.

**[22]** One of the issues of law raised by the applicant was whether art 8 of the Federal Constitution applied to the terms and conditions of the collective agreement.

**[23]** The Court of Appeal in upholding the High Court's decision ruled that a constitutional safeguard such as the right to equality fell within the domain of public law and as such dealt only with the contravention of individual rights by a public authority ie the state or any of its agencies.

**[24]** The Federal Court concurred with the Court of Appeal. Abdul Malek Ahmad PCA, in delivering the judgment of the Federal Court had this to say :

> We took time to examine this allegation carefully and we found it is simply not possible to expand the scope to art 8 of the Federal Constitution to cover collective agreements such as the one in question. To invoke art 8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said article. Constitutional law, as a branch of public law, deals with the contravention of individual rights by the *Legislature* or the *Executive* or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual. Further, the reference to the 'law' in art8 of the Federal Constitution does not include a collective agreement entered.

**[25]** In our considered opinion, the learned judge erred in law and facts in not following the Federal Court's decision in *Beatrice*'s case. There is no rhyme nor reason for the learned judge not to follow the decision of the highest court in Malaysia. It is clear that the agreement entered between the appellant and the respondent is a lawful contract between private parties though it requires the respondent to resign upon being pregnant or termination would take place in the event of refusal to resign.

**[26]** The interpretation accorded by *Beatrice*'s case on the constitutional effect is called 'vertical effect' which essentially stipulates that constitutional law, as a branch of public law, only addresses the contravention of an individual's rights by a public authority. We must remind High Court judges that they must observe judicial precedents in the interest of finality and certainty in the law and for orderly development of legal rules (see *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276; *Periasamy s/o Sinnapan & Anor v Public Prosecutor* [1996] 2 MLJ 557; [1996] 3 CLJ 187).

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**[27]** In support of his argument, learned counsel for the respondent relied heavily on *Noorfadilla*'s case. The brief facts of the case was that the plaintiff applied to the Hulu Langat District Education Office for the post of *Guru Sandaran Tidak Terlatih* ('GSTT'). Several days after the interview, she received confirmation that her application had been successful. When she attended the Hulu Langat Office as instructed, she was briefed on the terms of employment and was asked to report for duty immediately. During this time, an officer enquired if she was pregnant. She indicted that she was and, as a result, the appointment was revoked.

**[28]** The main issue before the High Court was whether the action of the defendants in refusing to allow a pregnant woman to be employed as a GSTT was tantamount to gender discrimination and a violation of art 8(2) of the Federal Constitution.

**[29]** What was significant in that case was the High Court's reliance on CEDAW in clarifying what is meant by the terms 'equality' and 'gender discrimination'. The High Court had this to say:

> ... the word 'gender' was incorporated into Article 8(2) of the Federal Constitution in order to comply with Malaysia's obligation under the CEDAW. It is to reflect the view that women are not discriminated ... In Article 11(2)(a) of CEDAW, it provides that State Parties shall take appropriate measure to prohibit, subject to the imposition of sanctions, dismissal on the grounds, inter alia, of pregnancy ... *(CEDAW) has the force of law and (is) binding on members states, including Malaysia*. (Emphasis added.)

**[30]** Before proceeding to discuss the issue, we would like to advert to some general discussions about CEDAW. CEDAW was adopted by the General Assembly of the United Nations in 1979 and came into force in 1981. It is a landmark international agreement that affirms principles of human rights and equality for women around the world. As of April 2014, 188 states have ratified or acceded to treaty. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

**[31]** Article 1 of CEDAW defines discrimination against women as ' ... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'. Thus, it incorporates both direct and indirect forms of discrimination.

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**[32]** Article II expressly relates to women's right to work, equal treatment at the workplace and the same employment opportunities as men. It prohibits dismissal on the grounds of pregnancy in particular.

**[33]** One of the important principles under CEDAW is the principle of the obligation of the State to implement the convention and thus give effect to the convention at the domestic level. By accepting the CEDAW, states commit themselves to undertake a series of measures to end discrimination against women in all forms, including:

(a) incorporating the principle of equality of men and women in their legal and administrative systems, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women;

(b) establishing tribunals and other public institutions to ensure the effective protection of women against discrimination;

(c) ensuring elimination of all acts of discrimination against women by persons, organisations or enterprises; and

(d) accelerating de facto equality by implementing affirmative action, including temporary special measures to address structural discrimination.

**[34]** Each State decides how best to achieve its implementation. The CEDAW committee has no enforcement authority; it can only make recommendations highlighting areas where more progress is needed in a particular country. Ratifying states submit a report on how they are implementing the convention one year after ratification, then every four years thereafter. The CEDAW committee reviews each report and comments on each State's progress.

**[35]** Malaysia is a signatory to CEDAW and ratified it in 1995. The first accession to the convention was made with a number of reservations, as it was felt that the relevant articles were in contradiction with the provisions of the laws of the country. Following the Beijing Conference, steps were taken to review Malaysia's reservations to the convention and reservations for articles 2(f), 9(1), 16(b),(d),(e) and (h) were withdrawn. The Ministry of Women, Family and Community Development (MOWFCD) had announced the Government's intention to withdraw the reservations on article 5(a), article 7(b) and article 16(2). The remaining reservations were made to the following articles:

9(2): equal rights with men with respect to the nationality of their children;

16(1)(a): equal rights to enter into marriage;

16(1)(c): equal rights and responsibilities during marriage and at its dissolution;

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16(1)(f): equal rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of child; and

16(1)(g): the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

**[36]** It should be noted that an announcement to withdraw reservations does not amount to withdrawal until an instrument of withdrawal is deposited with the Secretary General of UN.

**[37]** In our considered opinion, CEDAW does not have the force of law in Malaysia because the same is not enacted into any local legislation.

**[38]** In theoretical terms, the application of international legal systems is often explained in terms of the doctrines of incorporation (or monism) and transformation (or dualism).

**[39]** According to the doctrine of incorporation, international law is simply two components of single body of knowledge called 'law'. 'Law' is seen as a single entity of which 'international' and 'municipal' versions are merely particular manifestation. A judge can declare a municipal law invalid if it contradicts an international law because, in some states, the latter is said to prevail.

**[40]** The doctrine of transformation, on the other hand, holds that the two systems of law, international law and municipal law, are completely separate. A rule of international law can only become part of municipal law if and when it is transformed into municipal law by the passing of local legislation (see Dinah Shelton *(Ed), 'International Law in Domestic Legal System: Incorporation, Transformation and Persuasion'* (Oxford University Press, 2011); Brownlie, I, 'Principles of International Law', *3rd Ed, London, 1996, Chap 4*).

**[41]** The practice in Malaysia with regard to the application of international law is generally the same as that in Britain, namely, the executive possesses the treaty-making capacity while the power to give effect domestically rests with parliament. For a treaty to be operative in Malaysia, therefore, it requires legislation by parliament.

**[42]** The Federal Constitution of Malaysia contains no express provision with regards to the status of international law, or indeed any mention of international law at all. It does, however, contain certain provisions dealing with 'treaty-making capacity' in Malaysia.

**[43]** The combined effect of art 74(1) and the Federal List in Ninth Schedule

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to the Constitution is that the Federal Parliament has exclusive power to make laws relating to external affairs and relations with other countries (including through treaties, agreements and conventions), as well as the power to implement treaties, agreements and conventions. With regard to the executive power of the federation, art 39 provides that it shall be vested in 'the Yang di-Pertuan Agong and exercisable ... by him or by the Cabinet or by any Minister authorised by the Cabinet'. Since art 80 ensures that the executive authority of the federation extends to all matters with respect to which parliament may make laws, this means that the cabinet or its authorised minister is effectively vested with the power to do all acts necessary for negotiating, making, signing and ratifying treaties and other agreements entered into with other countries.

**[44]** When it comes to giving effect to treaty provisions in domestic law, however, it remains the case that for a treaty to be operative in Malaysia, legislation passed by Parliament is a must. This is despite suggestions that there may be some treaties which could be implemented locally without any necessity for the introduction of a statute (see Heliliah bt Haji Yusof, 'Internal Application of International Law in Malaysia and Singapore', [1969] Singapore Law Review, 62–71 at p 65). In other words, even though the executive has ratified a treaty and the treaty binds the government under international law, it has no legal effect domestically unless the Legislature passes a law to give effect to that treaty.

**[45]** In *Public Prosecutor v Narogne Sookpavit & Ors* [1987] 2 MLJ 100, at p 106 (FC), the respondents were Thai fishermen arrested while on a vessel 3 miles from the Malaysian coast and charged under the Malaysian Fisheries Act 1963. The respondents were unable to rely on a defence based on a right of innocent passage, as codified in article 14 of the Geneva Convention on the territorial sea. Shankar J held that:

> ... So before a convention can come into force in Malaysia, Parliament must enact a law to that effect. ... No Malaysian statute has been cited to me to show that Article 14 had become part of Malaysian law.

**[46]** In *Public Prosecutor v Orhan Olmez* [1988] 1 MLJ 13, the Supreme Court of Malaysia applied article 32 of the Vienna Convention on the Diplomatic Relations 1961, which had been transformed into Malaysian law by means of the Diplomatic Privileges (Vienna) Convention Act 1966. Another example of the application of international treaties by the Malaysian Courts through a statute made by Parliament is the case of *Regional Centre for Arbitration v Ooi Beng Chooi Anor (No 2)* [1998] 7 MLJ 193. In that case, the Court referred to a subsidiary legislation known as the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 made pursuant to ss 3 and 4 of the International Organizations Privileges and

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Immunities of the United Nations, 1946 , to which Malaysia is a party.

**[47]** The learned author, Tunku Sofiah Jewa, in her book 'Public International Law — A Malaysian Perspective', Vol I Pacific Publication, 1996 stated at p 35:

> Treaties to which Malaysia is a party may either require subsequent legislation, in which case they become the law of the land as soon as the necessary laws are enacted or, they may not in which case they remain within a special category of Malaysia's international law, *binding only herself vis-a-vis the other parties to the treaties but having no effect as such on Malaysian subjects*. (Emphasis added.)

**[48]** Further, Kevil YL Tan and Thio Li-Ann in *Constitutional Law In Malaysia and Singapore* wrote:

> Although CEDAW contemplates taking appropriate measure, including legal measure, against private parties which commit gender discrimination, the treaty is not self-executing and needs to be given effect by a domestic statute which confers a horizontal reach upon treaty norms.

**[49]** In our considered opinion, in Malaysia, unless a treaty is domesticated, it cannot be enforced. In other words, without express incorporation into domestic law by an act of parliament following ratification of CEDAW, the provisions of the international obligations in the said convention do not have any binding effect.

**[50]** In sum, insofar as Malaysia is concerned, treaties only domestically enforceable where they have been incorporated by statute. Ratification alone does not make the provisions of treaties applicable for municipal law.

**[51]** In *Malone v Metropolitan Police Commissioner* [1979] 1 All ER 256, the plaintiff asked the court to hold that a right to immunity from telephonic interception existed based, in part, on article 8 of the European Convention on Human Rights ('ECHR'). Sir Robert Megarry V-C, in delivering the judgment of the court, cautioned that courts in the United Kingdom could not implement treaties through the back door:

> It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the crown's obligations, or to discover for the first time that such rules have always existed.

**[52]** We may venture to say that looking from a dualist perspective, the act of incorporating a treaty into municipal law by way of transforming it into statutory law serves as a democratic check and can in part make up for the lack of direct participation of parliament in treaty making. Further, legislators may

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regard it necessary to tailor the treaty, through an act of transformation, to match domestic circumstances. The legal language used in a treaty may not be compatible with the language used in the legal system of an implementing state. The provisions of the treaty may further require elaboration or other adjustment to make treaty provisions enforceable within the legal system of an implementing state. Legislators may also wish to limit direct application to certain provisions of a treaty. The reason may be that the state does not intend to comply with its international obligation to implement the treaty as a whole, or that it wishes to delay the implementation of certain parts of the treaty.

**[53]** Before we conclude, it is pertinent to note that in Malaysia, the Federal Constitution is silent as to the primacy of international law or municipal law or vice versa. If there is such a conflict, the general rule is that the statute shall prevail. *Public Prosecutor v Wah Ah Jee* [1919] 2 FMSLR 193, (FMS Supreme Court) is illustrative of the point. The learned judge in that case stated that the court must take the law as they found it expressed in the enactments. It was not the duty of a judge or magistrate to consider whether the law so set forth is contrary to international law or not.

**[54]** It is obvious that *Public Prosecutor v Wah Ah Jee* followed the dictum in the English case of *Mortensen v Peters* (1906) 5 Adam 12 8 F 93, where it was held that:

> In this court we have nothing to do with the question of whether the legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is ultra vires as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms ...

## CONCLUSION

**[55]** In the result, we came to the unhesitating conclusion that cl 5.1(4) of the agreement does not discriminate against the rights of women. All clauses contained in the agreement, especially cl 5.1(4), do not restrain marriage and/or prohibit pregnancy if the respondent had completed the said trainee aircraft maintenance engineer programme in the manner as stipulated in the agreement.

**[56]** We, therefore, unanimously allowed the first appeal with no order as to costs, and we set aside the order of the High Court. Deposit to be refunded.

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A *Appeal allowed and the decision of the High Court set aside.*

Reported by Ashok Kumar

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